The Claim of William McGarrahan, *alias* The Panoche Grande Quicksilver Mining Company of New York, *vs.* The United States.

SPEECH

OF

HON. M. C. KERR,

OF INDIANA,

In the House of Representatives, February 18, 1871.

The House having under consideration the report of the Committee on the Judiciary on the memorial of William McGarrahan—

Mr. KERR said: During the last Congress, when this case was under consideration, as has been stated by the gentleman from Kentucky, [Mr. BECK,] I, together with most other gentlemen on this side of the House, voted for the resolution then reported in favor of McGarrahan. I did it, as other gentlemen did, without investigation, following the recommendation and action of the committee at that time, of which I was not a member. It is the practice of members upon all questions of this kind, involving laborious and intricate examinations of law and facts, to follow the recommendations and decisions of the regularly accredited organs of the House. Necessity oftentimes compels us so to act for lack of time or strength to make individual inquiries; but when it came to be a part of my duty to investigate the case judicially as a member of the committee in this Congress, I proceeded to divest myself of any opinion which during the last Congress I might have formed or expressed upon it, and to decide it for myself and upon my responsibility after the most laborious and painful examination, as a question for the most conscientious, impartial, and exact judicial determination. And it is in pursuance of the conclusion reached by me after that examination that I stand here to-day to support the report and the recommendations now made by the majority of the committee. This controversy is in many respects very extraordinary, and it is well calculated to confuse and distract any mind that will not impose upon itself the labor of a careful and full examination; but when this is done it becomes clear, and resolvable into a few questions not difficult to decide.

I hope, Mr. Speaker, that this honorable House will hear me while I give, briefly as I must, the reasons which have controlled me in arriving at my decision, and in the vote which I shall now give against the claim of McGarrahan. I say, Mr. Speaker, against the claim of McGarrahan. I do not mean to admit that McGarrahan has any claim here in his own right. Gentlemen have tried to impose upon this House a common dodge, known in courts of justice and before juries as the "sympathy dodge," in behalf of McGarrahan. I desire at the outset to disabuse the mind of the House as to that, and to show that McGarrahan's interest in this claim now is that of a mere figure-head, of a mere agent, instrument, and tool in the hands of other parties, who stand behind him and fill his hands and his pockets with money that he may come here and live year after year and in their behalf prosecute this rotten claim, having in it himself the most inconsiderable interest. At his back stands a powerful combination of adventurers and speculators, who have been duly incorporated.

Tracing the various conveyances in the history of this Panoche Grande claim, I find that December 22, 1857, was the date of Gomez's deed to McGarrahan for an undivided one-half of Panoche Grande. And remember that that was before there was any decision in his favor by any tribunal, good or bad, high or low, in the country. At the time of his purchase Pacificus Ord claimed to be the owner of the other half of the land in question, and to hold it by an unrecorded and secret and dishonest deed from Gomez. Neither Ord nor McGarrahan was ever in possession of an acre of the land, and both bought with their eyes open, with knowledge of the rottenness of the claim, and with intent and purpose thereafter to make it good by hook or crook, by fair means or foul.

Here, diverging for the moment somewhat from the line of my argument, I may as well state the fact that in Gomez's deed to McGarrahan it was expressly declared and recited that one half of the land or claim had been before that time sold to Pacificus Ord, under a contract between Gomez and Ord, Ord being at the time Gomez's attorney in the prosecution of the claim before the Mexican commission. And Ord is the faithless and dishonest United States attorney out of whose rascality and complicity in fraud all this trouble has arisen. He is the man by reason of whose corrupt betrayal of the Government Gomez or McGarrahan was enabled to obtain a mere foothold on which to erect this superstructure of villainy.

Now, how does McGarrahan stand here? Does he come before this tribunal with clean hands? Does he come here as an innocent purchaser? Is he entitled to protection in this House or in any court of the country upon the ground that he is an innocent purchaser, without notice of fraud and for a valuable consideration? Why, sir, it is well understood by all lawyers that the law imputes to any subsequent purchaser a knowledge of all facts relating to the same land, appearing at the time of his purchase, upon the muniments of title which it was necessary for him to inspect in order to ascertain the sufficiency of such title.

Judged by this rule of law McGarrahan bought nothing. He knew there was no possession in Gomez. He knew Gomez had no warrant, no patent, no legal title. He knew the Government was the owner of this land under the treaty of Guadalupe Hidalgo. It was only claimed by Gomez. The latter was therefore attempting to sell a mere inchoate and undecided claim, and the law does not look with favor on any such sales. It, too, was made

pending litigation, and is therefore denounced by the law as litigious, champertous, immoral, and against public policy. The civil law forbids a thing which is litigious to be alienated. McGarrahan, therefore, is in every view chargeable with notice, he bought for better or for worse, purchased only a chance, a game partly played, and at once proceeded, with the faithless and corrupt official Ord, to play his little game out against the people of the United States. He does not come into court with clean hands. It is to me matter of profound surprise that in the last Congress these most important and material facts were not brought to the knowledge of the House.

They not only cast suspicion and reproach upon his entire case, but subject it to all equities acquired before or after his pretended purchase, and leave him under the ban and condemnation of the law, which says that contracts of that kind are immoral—they cannot be sustained by courts of justice; and this one, therefore, ought not to be sustained here.

Now, then, on the 29th day of May, 1862, Pacificus Ord appointed McGarrahan his true and lawful attorney, to sell, without warranty, all his right, title, and interest in the claim to eight twenty-fourths of this Panoche Grande grant. But Ord at that time held twelve twenty-fourths, and therefore he reserved from this sale one-sixth of the entire title to this land; and that he has never parted with, so far as this record shows.

Now, what did McGarrahan do under this power from Pacificus Ord as to the eight twenty-fourths of this title and as to his own title to one-half? In pursuance of the power given him, McGarrahan, on the 17th of June, in the same year, conveyed, without warranty, eight twenty-fourths of the alleged grant to "the Panoche Grande Quicksilver Mining Company, a corporation duly organized under the laws of the State of New York," in consideration of the sum of one dollar. On the 3d day of February, 1865, McGarrahan conveyed the whole tract, as containing *four* square leagues, to the same corporation, in the city of New York, in consideration of the sum of $10,000, and again without warranty, showing all along that this thing was a mere speculative claim; that it was a mere kite that these men are flying in the face of the country, the courts of justice, and of Congress.

Passing over some intervening titles, which are unnecessary to be mentioned here, I remark again that the Panoche Grande Quicksilver Mining Company of the city of New York conveyed back all of this property, by a deed bearing date November 1, 1866, to McGarrahan, upon the consideration of one dollar without warranty. But why did they convey it back to McGarrahan? What had intervened before the Panoche Grande Quicksilver Mining Company reconveyed it to McGarrahan? Why, this: the Supreme Court of the United States, in two solemn decisions, had adjudged that there was no merit in this claim of McGarrahan; that he had no title whatever, and therefore all that he had conveyed to the Panoche Grande Quicksilver Mining Company in New York was worthless to them; and then they discovered that they must come here and organize this raid against the Congress of the United States; and they came here disguised in the person of McGarrahan, this poor, solitary, undefended Irishman. They took good care to send him here to influence this House with his pockets full of money, furnished him by the Panoche Grande Quicksilver Mining Company of New York, to enable him to employ counsel to advocate his

claims, not only before the Congress of the United States, but before the supreme court of this District, in an unauthorized and indecent attempt to dictate to the Department of the Interior what it should do to promote the interests of that New York corporation.

But before that reconveyance by the corporation to McGarrahan in 1866 and since, the same corporation issued capital stock, based upon its pretended title to the rancho, to the amount of ten or eleven million dollars. That stock has been liberally used and distributed by the corporation and McGarrahan, their agent, to advance the interests of both. These facts clearly mark this deed back to McGarrahan as a mere trick, device, blind, to mislead the House and country, and enable McGarrahan the more effectively to appeal to the sympathies of gentlemen.

But another very significant fact in this connection is, that after this pretended reconveyance to McGarrahan, the Panoche Grande Quicksilver Mining Company issued stock in large amounts, and I here present an original bond of that company, and incorporate it, as follows:

Incorporated under the Laws of the State of New York.

[No. 104.] [50 Shares.]

PANOCHE GRANDE QUICKSILVER MINING COMPANY OF CALIFORNIA.

Capital, Ten Million Dollars, in Shares of $100 *each.*

This is to certify that William McGarrahan is entitled to Fifty Shares in the capital stock of the Panoche Grande Quicksilver Mining Company, transferable in person or by attorney, on the books of said company at its office in the city of New York, on surrender of this certificate.

Witness the seal of the company, and the signatures of the president and secretary, this 21st day of May, 1868.

FRED. FRANCK, *Secretary.* B. O'CONNOR, *President.*

For value received, I hereby assign and transfer unto ———— ——shares of the within stock, and authorize ———— to transfer the same on the books of the company on surrender of this certificate.

Dated this —— day of ———, 18—

Now, Mr. Speaker, before I go further, I want to refer to a few things said by my friend from Wisconsin, [Mr. ELDRIDGE.] He, as well as my friend from Kentucky, [Mr. BECK,] told you that this was not a controversy between McGarrahan and the United States, but that it was a controversy between Mr. McGarrahan and the New Idria Mining Company.

Mr. ELDRIDGE. And that is so.

Mr. KERR. I say that is not true. I say it is a controversy between McGarrahan and the Panoche Grande Quicksilver Mining Company of New York, on the one side, and the United States on the other. I say, what the gentlemen all know, that the claim of McGarrahan and that company in New York in this case covers over seventeen thousand acres of land, while the New Idria Mining Company's claim covers but four hundred and eighty acres of land. I say that the claim of McGarrahan does not touch the land claimed by the New Idria Mining Company. It does not reach to it at all; and the survey which was made to reach to and embrace these mines was a fraudulent, dishonest, and corrupt survey, procured under a dishonest law of Congress, made by a dishonest surveyor, made in the interest and by the manipulation and for the money of McGarrahan.

Therefore, it is no issue here between McGarrahan and the New Idria Mining Company, except in a purely incidental and collateral way; and gentlemen untruthfully state the nature and substance of this controversy

when they so represent it; and their statements are calculated, if not intended, to mislead the House. If this claim of McGarrahan fail, then the Government and the people own the seventeen thousand five hundred acres of land which he claims, and it will then, like other public domain, become subject to entry and pre-emption under the law, and the New Idria Mining Company, as well as any citizen of the country, may take its chance under the law to acquire a title to any portion of it.

Mr. ELDRIDGE. Will the gentleman yield for a question?

Mr. KERR. For a mere question, yes.

Mr. ELDRIDGE. I wish the gentleman from Indiana [Mr. KERR] would state whether there have not been every day and every hour of the session of the committee of this House one or more counsel for the New Idria Mining Company present, and whether they have not examined every witness with the exception of one or two in the latter part of the case, and whether anybody has appeared during that time on behalf of the United States.

Mr. KERR. My answer to the inquiries of the gentleman is that there have appeared before our committee counsel for the New Idria Mining Company. They appeared there as much in behalf of the Government as of themselves; and because this fraudulent and dishonest survey, procured by McGarrahan and this Panoche Grande Quicksilver Mining Company of New York, was made to extend over and embrace their quicksilver mines, dishonestly and wrongfully; and against that extension of the lines of that survey they desired protection at the hands of the House, and are entitled to it. And in defence, therefore, of their claim, they appeared before us, and did try to resist this fraudulent claim. They had a right to do it, and in doing so, they did it as much in behalf of the United States as in their own behalf. Why? Gentlemen should remember that the United States is no more a defender of the New Idria Mining Company here than they are the defender of every pre-emptor of the public lands throughout the length and breadth of this country. It is the duty of the Government of the United States to protect and maintain the public domain, in order that the honest citizens of this country, whether corporations or individuals, may have fair, just, and equal opportunity to go upon those lands, locate their several claims, and prosecute and procure their titles before the proper departments of the Government. That is all the New Idria Mining Company asks.

We are not investigating the claim of the New Idria Mining Company. It is only incidentally and collaterally involved in this investigation at all. If we reject the claim of McGarrahan, what do we do? We remit this whole controversy to the tribunal where, under the laws of the United States, it belongs, to wit, the Secretary of the Interior and the Commissioner of the General Land Office, whose duty it is, under the law, to pass upon all claims of this kind, and issue patents to whom they belong. That is the true position in this case.

Mr. Speaker, here I want in a few words to refer again to that dishonest survey procured by McGarrahan and his corporation. In the conveyance back from the Panoche Grande Quicksilver Mining Company to William McGarrahan, bearing date on the 1st day of November, 1866, in consideration of the sum of one dollar, they conveyed "all that certain tract or rancho lying and being in the counties of Monterey and Fresno, State of California, and known as the Panoche Grande rancho, being the same lands

for which a decree of confirmation has been entered in favor of Vicente P. Gomez, in the district court of the United States for the southern district of California." The boundaries of the tract are then given by name, and correspond exactly with the boundaries given by Gomez in his original petition for the grant to the Mexican Governor, wherein the area desired and embraced within said boundaries is stated in the petition to be "three square leagues."

This is the conveyance under which McGarrahan now claims, and it will be perceived by reference to the description of the boundaries, and the area embraced therein, that it is essentially different from the tract which the House bill provides he may enter. The latter tract is established by the Dyer survey, made four years prior to the date of this conveyance back to McGarrahan, and yet he chose then to take the land by the description given in the deed to him from Gomez rather than by the enlarged boundaries fixed by the survey of 1862, which gives him an additional square league, and describe his tract as follows:

"North by Julian Ursua; westerly by the lands of Francisco Arias; east by the Tulare valley, and south by the Santa Anna river."

The southern boundary in the original petition of Gomez to the Mexican Governor is called the *serrania*, (mountain range,) and in the deed of Gomez to McGarrahan of December 22, 1857, it is called "the hills." In the Dyer survey, under which he now claims, it is neither "the mountain range" nor "the hills," but "the Santa Anna river," and here the fraud of the survey becomes most apparent, for McGarrahan and his surveyor, in order to embrace the mineral lands adjacent to "his agricultural tract," leaps over "the mountain range" or "the hills," and fixes his southern boundary on "the Santa Anna river." In other words, to enable him and the New York corporation to grab the mines on the mountains, he deserts his original claim as made by Gomez, for agricultural lands in the valley, and attempts to stretch out his boundaries some seventeen miles up the mountain side, and thus embrace the property, the four hundred and eighty acres, claimed by the New Idria Mining Company.

There was but a single survey ever made under the law of June 2, 1862, under which this survey was made by direction of McGarrahan himself, and in his personal presence. That law declared that surveys made under it should "only be *prima facie* evidence of the true location of the grant." The proper officer forbade any more work to be done under that law. The testimony in this case clearly shows that this survey was not and within the time in which it was claimed to have been made, could not have been fairly and honestly made, and therefore it ought not to be received as proof of the *true location* of the Panoche Grande grant, even if McGarrahan were the true owner thereof. There was manifest and corrupt complicity between the surveyor and McGarrahan. This felonious attempt of the Panoche Grande Quicksilver Mining Company of New York, by their supple agent, McGarrahan, to extend their pretended boundaries up the mountain and seize the mines in the possession of the New Idria Company, was an after-thought, suggested to McGarrahan and Ord by the discovery of the mines, in 1852, by the grantors of the latter company.

The gentleman on the other side persisted in repeating the assertion that the New Idria mines were discovered in 1858, after McGarrahan had purchased from Gomez, and had become a partner with Ord, while the facts

in the sworn proof are, that the New Idria mines were discovered early in 1852, more than a year before the map and petition were offered before the land commission, which discovery most probably suggested the manufacturing of a grant that should be made to cover the mine, hence all the subsequent frauds in the history of this notorious Panoche-Grande-Quicksilver-Mining-Company-McGarrahan case.

One word now in reference to Judge Black in connection with this case. By way of throwing mud, by way of soiling the reputation of everybody in connection with the case who opposes this claim, it has been broadly insinuated that Judge Black has been corrupt and dishonest in his connection with it. I say to this House that after having Judge Black before the committee, and all the other testimony made in this case, I look upon it now as not only unjust but dishonest to impute personal or official corruption to Jeremiah S. Black in connection with this case. Notwithstanding the wrangling criminations and insinuations of counsel before the committee, there is nothing in the record which, fairly and impartially weighed, attaches any wrong, official impropriety, or personal dishonesty to Judge Black. On the contrary, the whole case shows that he was only solicitous to protect the Government and defeat a corrupt and baseless claim.

Now, I want to answer for him out of his own mouth. I read from what he has stated under oath in reference to this case. Speaking of the manner in which these cases came before Congress, he says:

"It was my duty to oppose a false and fradulent claim any how. In nine of these cases out of ten the land in controversy was occupied by persons who had bought, or expected to buy, the whole or part of it from the United States. In some cases cities and large towns, in others great numbers of agricultural people, were in danger of having the fruits of their labor and money swept away by forged Mexican grants. They had no protection for their rights except what they could get from the courts. The confirmation of a Mexican title was an estoppel not only upon the United States, but upon all persons claiming under them.

"In such a case there will be no question raised about any other title than that of which confirmation was sought. I expressed officially what I thought and still think was the duty of my office, in a letter on the Castelle case, addressed to the President, March 28, 1859: 'Yield everything that law and justice demand, sift doubtful claims to the bottom, and show no quarter to those which appear to be corrupt.' I believed this one to be corrupt, and I resisted it accordingly. But I did it fairly. I alleged no fact and I asserted no legal proposition which the claimant had not a full opportunity to controvert; and I think I never made a point which the judges of the Supreme Court did not unanimously sustain. Whosoever says that I received anything for this except my salary, or that my official action was influenced by any motive except a sense of pure duty, speaks falsely. I went out of office with hands as clean as they were empty.

"Mr. Stanton was my successor, and had been my assistant. To my certain knowledge he took exactly the same view of this case that I did.

"After March, 1861, I had no concern in the business. Mr. Bates employed Mr. Stanton as special counsel in this and other cases. He did not employ me; that is to say, not in this case, but he did in some others, where Mr. Stanton had been retained against the United States. I had no connection with it, and took no part in it until two years or upward after I went out of office. Then I was asked by Mr. Shepherd, of New York, and Mr. Latham, Senator from California, and subsequently by Mr. Goold, if I would consent to appear for the United States with the Attorney General, and aid him in opposing the claim of Gomez. I suppose nobody will deny that it was perfectly right and proper for me take the case at that time and under those circumstances. I was as free as any other member of the profession. The fact that I had been Attorney General certainly did not disfranchise me. I never heard a doubt of the professional or moral propriety expressed by any human being. I have done the like in many other cases. So have all persons similarly situated. The then Attorney General, Mr. Bates, gladly accepted the aid which I was employed to render in the case. It shared the labor and responsibility, and it saved him the necessity of employing special counsel and paying them out

of the public funds; for Mr. Stanton had by this time become Secretary of War, and given up the practice."

I say, therefore, that these flings against the distinguished ex-Attorney General are at once uncalled for and unjust, and the gentleman from Kentucky [Mr. BECK] relieves his charges of but little of their poison when he compliments the great ability of Mr. Black at the expense of his personal and official integrity.

Again, in speaking of his connexion with this case in his efforts to defeat this fraud upon the Government in the Supreme Court, he says:

"I notified the court of the evidence I had of these facts. About the truth of the facts I had no doubt, because Mr. Stanton was perfectly incapable of making a false report to me. His judgment upon cases of this kind was as good as that of any other man living. When I got the evidence, whatever it was, I considered it as simply confirming his statements and confirming my previous belief."

The gentleman from Wisconsin has undertaken further to say—and I was exceedingly surprised to hear it—that the district court of California, after a solemn adjudication of this case, decided it in favor of McGarrahan, or Gomez, which is the same thing. I say to him, and I say to this House and the country, that the United States district court of California never examined this case, never heard one particle of testimony, never even looked into the record, never investigated it at all; but in all its action it was controlled by the dishonest, selfish, corrupt suggestion of Pacificus Ord, whose complicity in the fraud is clear.

Mr. ELDRIDGE. The gentleman from Indiana is quite mistaken in what he says in regard to my statement. I stated most distinctly and emphatically that the only tribunal that had before it the merits of the case was the land commission; that they alone examined the testimony; that they alone had the proofs before them; that no other court or tribunal ever had the merits of the case before them for examination.

Mr. KERR. Mr. Speaker, I say in reply to that remark that the gentleman is in this as much in error as in anything else he has said. I say that the Supreme Court of the United States had before it precisely the same record, the same evidence, the same facts which were before the commission organized under the treaty of Guadalupe Hidalgo. It could not be otherwise. The imperative requirements of the law settled that. That commission was required to put upon its record everything, whether of pleading or evidence, which was presented to it in each case.

Mr. ELDRIDGE. I hope the gentleman does not intend to misrepresent me. I stated that the record went up to the district court and the Supreme Court; but that those courts only examined and were only authorized to examine the record made up by the board of commissioners; that the latter was the only tribunal that adjudicated upon the facts.

Mr. KERR. Mr. Speaker, the gentleman's assumption now is as baseless as any other that he has made. I say that in this case and in all these cases (and in what I say I am sustained by the adjudicated cases in the Supreme Court of the United States) the jurisdiction of that court was as complete and perfect over this case as over any other case; that they had before them not only what appeared upon the mere technical record furnished by the commission, but that in that record, in pursuance of the very law under which the commission was organized, there was embodied every particle of evidence upon which the commission had acted, so that

when the record went up to the Supreme Court it presented the case precisely as it had been presented before the commission in its facts, testimony, proofs, and pleadings. There was therefore no reason in the world why the Supreme Court, on the hearing of the appeal, could not act just as wisely, judiciously, and advisedly as the commission or the district court or any other tribunal on earth.

In this position I am sustained by the express and solemn decision of the Supreme Court, made on a review of all this evidence and record, and I hope gentlemen will give me their attention while I read a brief extract from that decision. It is said that this case was never considered on its merits elsewhere than before the commission I say it was considered as much upon its merits in the Supreme Court as it was before that commission; that under the law, and with the record before them, the information and the power of the Supreme Court were as full, ample, and perfect as those of the commission. And so the court in 1865 says:

"Regarding the case as regularly before the court, it becomes necessary to examine the merits of the claim. Some suspicion attaches the claim, because it is made for four leagues of land, whereas the only document introduced in support of it, which is of the least probative force, represents the original claimant as having asked for but three leagues. Document referred to purports to be the petition of the claimant to the Governor, and there is appended to it the usual *informé;* but there is no concession or grant, nor is there any satisfactory evidence that any title of any kind was ever issued by the Governor to the claimant. He states in his petition to the land commissioners that he obtained the map in the record from the proper officers of the department; but the alleged fact is not satisfactorily proved. Four witnesses were examined by the claimants before the land commissioners, but only one of the number pretended that he had ever seen the grant, and his statements are quite too indefinite to be received as satisfactory proof.

"Instead of proving possession under the grant, it is satisfactorily shown that he never occupied it at all, and it is doubtful if he ever saw the premises during the Mexican rule. Land commissioners rejected the claim, but before it came up for hearing in the district court his attorney had been appointed district attorney of the United States; and the proofs show that he conveyed two leagues of the land to the district attorney. Circumstances of the confirmation of the claim in the district court are fully stated in the opinion of this court given when the mandate was revoked and recalled. *Comment upon those circumstances is unnecessary, except to say that the confirmation was fraudulently obtained.*

"Although the decree was fraudulently obtained, still, inasmuch as it is correct in form, it is sufficient to sustain the appeal for the purpose of correcting the error. Party who procured it cannot be allowed to object to its validity as a means of perpetuating the fraud, especially as he did not appeal from the decree." (3 Wallace, p. 766.)

It is not needful further to refer to the language of the court than to show that the confirmation was fraudulently obtained. Yet the gentleman says that the Supreme Court never passed that kind of condemnation on the official fraud and rascality of Pacificus Ord. The court, in the twenty-third of Howard, in the first of Wallace, and third of Wallace, say that by reason of the conduct of that officer, and the deception thus practised on the district court of California, all these proceedings were fraudulent and rotten, and therefore ought to be set aside. Hence the power of the court is interposed to defeat the fraud.

But we are told that the court has no jurisdiction, and I am again unable to agree with my friend from Wisconsin, good and excellent a lawyer as he is, when he says that on the subject of jurisdiction the decision of the Supreme Court is not final; that it amounts to nothing, and that it may be set aside collaterally or in any other way. It is a sufficient answer to that to say that the Supreme Court of the United States is a court beyond

which, in the good providence of God in this country, there is no appeal. Its decision is absolutely final, and no court in the country, unless a court organized in the spirit of rebellion and treason, can ignore and set aside the judgments of that court. Its decision in this case was not *coram non judice*, but in all respects legal, regular, and conclusive.

Now, Mr. Speaker, I beg the attention of gentlemen while I give in some detail a brief historical statement of the facts connected with this controversy in the courts. The claim of Gomez, the grantor of McGarrahan, having been adjudged and conceded to have been unfounded and fraudulent, the question is whether the succession of McGarrahan thereto has conferred upon him an equity which this House ought to recognize and support. March 6, 1855, the land commission rejected the Gomez claim. Thereupon an appeal was taken by claimant's attorney, Pacificus Ord, to the district court for the northern district of California, and was subsequently transferred to the district court for the southern district, at the instance of Ord, who was shortly afterwards appointed attorney of the United States for said southern district.

Why did he take this case to the southern district court? Because in that court he was attorney of the United States, and could maintain his own title and the title of Gomez in a court where he had power. The transfer was made on the application of Ord, the owner of half this grant, which he was pretending to protect on behalf of the nation. He and his co-conspirator, McGarrahan, desired the case in a tribunal where they could abuse the confidence of the court to procure a confirmation.

On the 24th of November, 1856, while district attorney, Ord received from Gomez, for the nominal consideration of one dollar, a deed of conveyance for an undivided half of the land in controversy, namely, the Panoche Grande rancho, and this pending the appeal in the district court.

On the 5th of June, 1856, Ord procured a brother lawyer, a man named Hartman, to move the court to reverse the decision of the land commission and confirm the grant, stating in open court, in his official capacity, that it was a case in which there was no dispute. With what grace could McGarrahan, in the person of his co-conspirator against the rights of the United States and all of its people—with what grace could McGarrahan, in the person of this Pacificus Ord, come up before that United States court and say that it was a case in which there was no dispute? Yet this was stated by Ord, and that the United States had no objection to the confirmation of the grant; and thereupon an order of confirmation was made, but no decree entered. At this time Mr. Ord was the owner of an undivided half of the land. I want gentlemen to remember this all the time as most vital and material to the just determination of this case. Before a decree of confirmation was entered, to wit, December 22, 1857, McGarrahan, in consideration of $1,100, received from Gomez a deed of conveyance for the land in controversy, which said deed contains the following reservation:

> "Subject, however, to an agreement heretofore made by the party of the first part (Gomez) to and with Pacificus Ord, Esq., by which the said party of the first part is to convey to said Ord an undivided interest in said rancho or tract of land, not exceeding the one undivided half thereof."

It is manifest that McGarrahan also had notice of Ord's unlawful connection with the case and of his interest in the land by the express reservation just quoted from his very deed. McGarrahan was put upon inquiry;

the act of his co-tenant, Ord, in joint behalf, was his act. He was, therefore, *particeps criminis* in Ord's rascality, and has no equity. At the date of this conveyance no decree of confirmation had been entered by the court. An order of confirmation had been made, it is true; but the first decree in the case was filed and entered January 7, 1858, as of June 5, 1857, confirming the land as "three square leagues." Subsequently, to wit, on the 8th of February, 1858, another decree was filed and entered as of June 5th, 1857, confirming the land as "four square leagues." This decree was entered at the instance and at the request of Pacificus Ord, whose heart and whose hands are stained all over with corruption.

From this it appears conclusively that the confirmation by decree of the district court of the alleged grant was not actually made until the 8th of February, 1858, as was decided by the Supreme Court (1 Wallace's Reports, 699, and 3 Wallace's Reports, page 763, in the case of United States *vs.* Gomez) subsequent to the date of the conveyance from Gomez to McGarrahan, and both the decrees of January and February, 1858, were filed by Ord; and hence it is but fair to presume that McGarrahan himself was privy to the transactions of that person respecting their common property, especially after the date of his conveyance to McGarrahan, to wit, December 22, 1857; and as Mr. Ord appeared as the joint tenant of Gomez, so he did as the joint tenant of his successor, McGarrahan; and in this respect the latter stands *particeps criminis* in the prosecution of the original fraudulent claim, and the means resorted to by himself and his co-tenant, Ord, to secure final confirmation of the fraudulent decree of February 8, 1858, appear by reference to the case of the United States *vs.* Gomez, (23 Howard, page 338,) which I wish I had time to read.

In that case it is fully shown that McGarrahan caused a false transcript from the court below allowing an appeal in the case to the Supreme Court of the United States, when in point of fact no appeal had at that time been allowed or taken. And so also the Supreme Court in that case decided. The object of this was to procure the docketing and dismissal of the cause by that court for want of prosecution of the appeal, which was done, and fraudulently done; but at the next term, the facts having been brought to the attention of the court, the case, on motion of the Attorney General, was rejected, and the appeal dismissed by reason of the fraud to which I have referred.

In further verification of these statements, I will insert an extract from the judgment of the Supreme Court in 23 How., p. 339, rendered in 1863. The court say that the evidence before them establishes—

"That Mr. Ord became the purchaser of half the land in controversy from Gomez, the claimant, when he was the district attorney of the United States; that whilst he was district attorney he prepared in his own hand the paper signed by S. O. Crosby, for the removal of the cause from the board of land commissioners to the district court; that Mr. Ord did not officially, as district attorney, represent the United States in the case in the district court, in any one particular, *but allowed it to be done by others who were interested in establishing the claim of Gomez, to whom he gave his official confidence, and who are shown by the record not to have been the retained attorneys of Gomez; that he permitted a judgment to be taken against the United States without argument, or the production of proof to establish the validity of the claimant's right to the land, by saying to the court, in his official character, that the United States had no objection to the confirmation of the claim.* And it is established by the record itself *that no appeal has been given to the United States by the court below.*"

This is from the unanimous judgment of the court.

The next judicial step in the case was the setting aside of the fraudulent decree of confirmation by Judge Ogier, of the district court for the southern district of California, on the 21st day of March, 1861, in consequence of the discovery of the fraud practised upon the court by Ord in procuring it, and that fraud is set forth and exposed in first and third Wallace, in the same case to which I have already referred. Mr. Speaker, the annulling order of Judge Ogier came up for review before Judge Haight, his successor, Judge Ogier having died meanwhile, on the 4th of August, 1862. McGarrahan's counsel moved to rescind it, which Judge Haight reluctantly did, because, as held by him, the court had no jurisdiction in the premises when the order of March 21, 1861, was made.

I wish I had time to read from the reasons assigned by Judge Haight for rescinding the previous order of his predecessor. He says in his order rescinding it that he was not surprised at the manifestation of a feeling of disapprobation and abhorrence by Judge Ogier when he discovered the fraud which had been practised upon him, and by reason of which he set aside the previous order of his own court and ordered a trial *de novo*, so that for the first time, for once at least, before a final order is made in his court in the case, he might judicially hear and examine the case, which hitherto by reason of the fraud of Ord he had been prevented from doing. From the decision of Judge Haight, setting aside Ogier's annulling order, and restoring the fraudulent decree of February 8, 1858, the United States appealed to the Supreme Court of the United States, and here the record shows that McGarrahan resorted to almost every conceivable trick and fraud and corruption to prevent the transmission of the case to the Supreme Court, and was after a long and most remarkable struggle defeated.

The Supreme Court, in 1865, in another unanimous judgment against this iniquitous conspiracy, reported in 3 Wallace, p. 765, says:

"Six times the demand was made of the clerk for the transcript, and the request, as often as it was made, was refused. Such demand was made by the special counsel of the United States, and by the district attorney, and by the authority and direction of the Attorney General. Throughout, the clerk refused to furnish the transcript."

The transcript was procured and the case regularly docketed in the Supreme Court. McGarrahan's counsel then sought to have the appeal dismissed because it had not, as alleged, been taken within five years from the rendition of the decree of confirmation by the district court. That motion was denied by the Supreme Court, and the opinion of that court adverse to the motion of McGarrahan's counsel is set forth in 1 Wallace, p. 702, and in that opinion of the Supreme Court by Justice Clifford, which is beyond all question sound in law, the Supreme Court decided that every ground of the motion was untenable; that the case should not be dismissed; that the jurisdiction of the Supreme Court over the appeal was complete and perfect, and that if these gentlemen representing McGarrahan or the Panoche Grande Quicksilver Mining Company of New York, or any other rotten corporation anywhere else in the country, desired to assert any other remedy, they must do it under the rules of the court by suggesting a diminution of the record, and going back to California with a *certiorari* requiring that the record be made perfect.

Why did they not do that thing? It was because—and the record and the testimony justifies me in saying it—because the parties and their lawyers understood that they had no hope for the salvation of this case except

by forcing their fraudulent proofs down the throat of the Supreme Court and rushing the case through against law and truth. The appeal having been sustained, the case came on for decision on the merits, and the opinion of the court therein will be found in 3 Wallace, which I have already read.

Now, sir, a word or two in reply to another point suggested by the gentleman from Wisconsin, as to the question of the jurisdiction of the Supreme Court in the premises. The record shows that an order of confirmation in favor of the McGarrahan grant or Gomez grant was made by the district court of California on the 5th of June, 1857, but no decree was entered until January 7, 1858, and even that was not a final decree, for on the 8th of February following another decree was entered confirming the same lands, with an additional square league, to the same parties. This decree stood unreversed until the 21st of March, 1861, when the same judge set it aside, and it remained set aside and annulled till the 4th of August, 1862, when it was reinstated by Judge Haight. From his decision the United States appealed, and the appeal was allowed.

It is true that Judge Haight subsequently, to wit, in December, 1862, set aside his own order allowing the appeal; but the case was then beyond his jurisdiction, and the question as to the regularity of the appeal belonged to the appellate tribunal, the Supreme Court of the United States, which, as I have already stated, decided that it had jurisdiction, and decided that the appeal had been properly taken within the time allowed by law. A brief review of the facts, bearing in mind those I have already given with so much particularity, will show that this was true. The order of confirmation was made on the 5th of June, 1857; the final decree therein was entered on the 8th of February, 1858, and this was the first record from which a transcript could be made sufficient to explain and support the appeal.

On this point the same court, in another unanimous opinion in 1863, in 1 Wallace, p. 699, says:

"Plainly there was no decree of any kind in the case until the 7th of January, 1858, and as that was ordered to be amended by substituting another in its stead, the final decree in the case was that of the 8th of February, 1858. Five years, therefore, had not elapsed after the decree was entered before the appeal was taken; and consequently the ground assumed in the motion to dismiss cannot be sustained."

And from the date of it the United States had by law five years in which to appeal, to wit: from February 8, 1858, to February 8, 1863. The appeal was taken on the 4th day of August, 1862. Besides, the law contemplates that the decree from which the appeal may be taken shall be in force during five consecutive years, on any day of which the appeal may be regularly and properly taken. Here there was no time between the 21st of March, 1861, and the 4th of August, 1862, during which time the annulling order of Judge Ogier was in force and effect.

Now, so far as respects the objection that the true date is the date to which the *nunc pro tunc* order relates, it is only necessary to observe that under the repeated decisions of the Supreme Court a *nunc pro tunc* entry is never allowed to work injustice or fraud. Otherwise appellants might often be deprived of their remedy of appeal, and great wrongs be perpetrated upon parties by retroactive orders of courts. Rules of court and laws are not made to facilitate but to defeat and prevent fraud. So with the rules governing in this case.

Now, having gone over this case in this general and hurried manner, I

want to make two or three remarks more, and then I will close. It is proposed now by the minority of the Committee on the Judiciary, who in their report concede and admit that McGarrahan has here nothing but a color of title, that this House shall, by its solemn judgment, interpolate, interject, contrary to the practice of the whole world in such cases, into the record of another co-ordinate branch of the Government, a lie. Yes, sir, a lie, in the form of a declaration that a patent had been executed to McGarrahan, when in truth and in fact no patent was ever executed to him.

In their report the minority do not pretend that any patent, in the legal sense of the word, was ever executed to McGarrahan; and no such patent ever was issued or executed to him. And the paper which was in part executed, and which under some circumstances might have become a patent, never was, and they do not pretend that it ever was, delivered to McGarrahan or to anybody else. Everybody knows that an undelivered patent is a worthless piece of paper and amounts to nothing. But no patent was executed, even.

Under a somewhat loose custom in the Land Office, where from fifty thousand to ninety thousand patents are made up each year, they are written up by the clerks as if finally passed upon and ordered, in the routine practice of the office, and then they await final approval and confirmation. So in this case. But this patent never was finally approved nor on the record ever signed by the recorder of the Land Office, nor even delivered, nor its delivery ever ordered.

Mr. MAYHAM. Will the gentleman allow me to ask him a question?

Mr. KERR. Yes, sir.

Mr. MAYHAM. If the Land Office has issued a patent, and entered it upon record, has not the office exhausted its entire power in that regard, and does the patent, under those circumstances, require a formal delivery to make it effective and valid?

Mr. KERR. The gentleman assumes a fact which does not exist, that a patent ever was executed in that way. But I say that if such a patent had been in all respects of form fully executed and regularly recorded, yet, as against manifest and outrageous fraud, as in this case, it has not the value of a feather; it is not worth a penny; it ought not to stand for one moment in the face of a contravening interest. Besides, I say it is not final or conclusive on the department. Until actual delivery it is under the full and complete and legal control of the department.

Mr. MAYHAM. One other question.

Mr. KERR. Very well.

Mr. MAYHAM. If the Land Office had issued a patent which might be valid and which was valid as to that office, has that office the right, without the intervention or the order of a court, to vacate or mutilate that patent?

Mr. KERR. Beyond all question, it has a right to defeat a fraud, to stop the patent, and institute further examination to protect the Government. Beyond all question, the Interior Department, to the exclusion of the world, has jurisdiction under your laws over questions of this kind; and anybody else, whether the supreme court of the District of Columbia or any other tribunal, that shall attempt to overrule the jurisdiction and discretion of that department of the Government, will attempt a lawless act. The department of the Government to which under the law is given

jurisdiction over all these questions of location, of pre-emption, of title to the public land of the country, is the Interior Department, or the Commissioner of the General Land Office, and on appeal from the Commissioner, the Secretary of the Interior. After a patent is even fully executed and signed by the President, it may be suspended as to delivery, or recalled for correction, and, if improvidently written out and signed, it may be cancelled.

Now, if McGarrahan had any patent executed to him, why is it that up to the 8th day of July, 1870, neither he nor any of the astute gentlemen who have talked in behalf of McGarrahan, none of his counsel, none of his able lawyers, ever before discovered that he had any such patent? Why is it that prior to July 8, 1870, all the counsel of McGarrahan and of the Panoche Grande Quicksilver Mining Company of New York, which stands at his back, always conceded that there had been no patent executed? They never claimed any such thing.

The patent in question is claimed to have been engrossed and executed fully on March 14, 1863; but R. H. Gillett, of counsel for McGarrahan, on June 23, 1863, in his written argument to Mr. Secretary Usher, said that "before the patent *was actually signed* the Attorney General requested that its issuance might be delayed, which was ordered by the Assistant Secretary." And that order was as follows:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *March* 13, 1863.

SIR—The Attorney General has notified this department that he intends to have the case of the land claim of Vicente P. Gomez, known as the Panoche Grande, brought before the Supreme Court of the United States for review, for the purpose of testing the validity of the grant.

Under these circumstances *you will suspend the execution and delivery of a patent*, under the decision of this department of the 4th instant, until further advised in the case by the Secretary.

I am, sir, very respectfully, your obedient servant,

W. T. OTTO, *Acting Secretary.*

COMMISSIONER GENERAL LAND OFFICE.

My time is so short that I will add but a single remark. The pretence that there ever was an executed patent in this case is negatived by all the evidence before the committee, except the testimony of one man; and any fair and unprejudiced mind, reading all the testimony, including that of this witness, must come to the conclusion that the testimony of that one man must not be allowed to override and weigh down the testimony of all the others, but, on the contrary, it should be assumed by the House and by the country that the witness who testifies against all the facts on the record, and against all the other witnesses, testifies to what is false, and I believe he does.

I protest that a more vicious and dangerous act could not be committed by Congress than to attempt, under these circumstances, to tamper with the solemn and repeated adjudication of this case by the Supreme Court. The whole matter is in every just and legal sense *res adjudicata.* Congress is not a judicial tribunal. It is not fit, qualified, or constituted to perform judicial duties. It should promptly and indignantly rebuke every attempt to induce it to interfere with the regular course of justice in this way. To assume jurisdiction in this case will but invite similar appeals in other rotten and fraudulent claims which have been judicially condemned. In the interests and for the safety of all the people, let us stand by the courts.

Gibson Brothers, Printers, Washington.